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72-688

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-688

WHITE MOTOR CORPORATION, an Ohio Corporation, and FREIGHTLINER CORPORATION, a Nevada Corporation,
Petitioners,

VERSUS

FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for Petitioners

October, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, White Motor Corporation, an Ohio Corporation, and Freightliner Corporation, a Nevada Corporation, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit entered August 11, 1972, and the order of the Court of Appeals overruling Petitioners' Petition for Rehearing on September 5, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case (App. A) has not yet been reported.

The opinion of the court below denying Petitioners' Petition for Rehearing (App. B) was not reported.

The opinion of the District Court overruling the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict, set forth in (App. C), was not reported.

JURISDICTION

The final decree of the Court of Appeals was entered on August 11, 1972. (App. A, *infra*, p. A-12). A timely Petition for Rehearing was denied by order of September 5, 1972. The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Court of Appeals nullified the basic rule of product liability, as recognized by other Circuit Courts, in holding that evidence of defective design, which had been specifically eliminated from the case in the trial court, would create an inference of a defect existing at time of transfer of the product sufficient to present a jury question, where the plaintiffs' evidence was otherwise completely speculative as to existence of defect, at time of delivery.

STATEMENT OF THE CASE

This action by Finis Stewart, plaintiff, against defendant White Motor Corporation and Freightliner Corporation, seller and manufacturer of an alleged defective truck, for personal injuries, involves a one-vehicle accident, which plaintiff was driving on June 6, 1969, with Lee Way Motor Corporation, purchaser of the truck, appearing as an intervenor to cover workmen's compensation payments to plaintiff, as its employee. From a jury verdict of $350,000.00 in favor of the plaintiffs, the defendants filed Motions for Judgment Notwithstanding the Verdict and for New Trial upon the grounds that plaintiff had offered no evidence that a defect in bolts holding an equalizer bracket, as the alleged cause of the accident, had actually existed at the time of sale of the truck to Lee Way. The trial court's order overruling both motions on September 17, 1971 (App. C), in effect recognized the error and called upon the appellate court below for "close study" on appeal.

On June 6, 1969, at approximately 1:05 a.m., while driving the alleged defective truck for Intervenor Lee Way Motor Freight, Inc., in a southwesterly direction on the Will Rogers Turnpike, about four (4) miles east of Vinita Interchange, plaintiff was injured when the truck overturned after traveling along the edge of the road for approximately 1850 feet, turning abruptly to the right, then back to the left, and finally to the right again, overturning and resting on its left side, headed in the opposite direction.

Evidence was undisputed: 1) That the truck manufactured by Freightliner and sold by White to Lee Way more than one year before, had current mileage of 237,448

miles; 2) had been subjected to continuous and regular maintenance by the intervenor, including application of maintenance with heavy breakover wrenches to the bolts alleged to have been defective; and 3) that plaintiff's only evidence of cause of the failure was that the bolts must have sustained *either* excessive torque, excessive vibration from the bolts becoming loose, *or* defective bolts installed at the time of manufacture. The bolts and bracket had been disposed of by intervenor, and there was no effort to prove a metallurgical defect existing at time of delivery, or offer testimony concerning examination of the broken bolts or the bracket.

Although the question of "design defect," as injected by the Court of Appeals, was presented by the initial complaint of plaintiff, it was specifically withdrawn by plaintiff on the trial of the case, and the issue of design was not presented to the jury, nor was it a part of the trial court's judgment.

The plaintiff testified that he felt a vibration, took his foot off the accelerator, did not apply the brakes, and with difficulty held the truck on the shoulder to the right of the road until he finally lost control, and the truck changed directions and overturned, injuring his leg.

Lee Way employees testified that after the accident, the right equalizer bracket had broken from the frame and was hanging down with all five bolts broken, and three of them rusted. Plaintiff presented no expert testimony that the bolts were either defective at the time of installation by Freightliner, or delivery by White to Lee Way, or that the equalizer assembly, including the bolts, was improperly

designed. There was no testimony that the broken bolts were even the same ones installed in the truck by Freightliner when the truck was delivered one year and 237,448 miles prior to the accident.

Plaintiff's only expert witness, Professor Halley, Physicist, gave opinion evidence that failure of the bolts and falling of the equalizer bracket would have caused the truck to overturn, and the failure of the bolts could have resulted from: a) defective bolts; b) excessive torque on the bolts; c) lack of maintenance that could have permitted the bolts to come loose; or d) the force of the wreck. The witness admitted that he had no training or capability as an automotive engineer, and he had never seen or examined the bolts or equalizer bracket which were alleged to hav been the cause of the accident.

REASONS FOR GRANTING THE WRIT

The decision of the court below is believed to be erroneous for the reason that the decision is in conflict with prior decisions in other circuits and the application of the rule of law set forth in the decision. The court below recognized the rule of law in product liability cases wherein "defect must be shown to exist at the time of delivery from the seller and manufacturer," but nullified the practical application of the rule, which is in conflict with other circuits, and further, the said decision is inconsistent with the ruling and the issues involved in the trial court.

The court below affirmed the judgment of the trial court in stating that the evidence as presented was suffi-

cient to draw the inferences of defectiveness in "design" of the bolts which produced the failure (App. A, p. A-9). The issue of design was not involved in the trial court's decision, as the transcript of record clearly and precisely sets forth that the issue of design to impose liability on the manufacturer was withdrawn from the case prior to the time that it was submitted to the jury for their determination. The court therefore has gone outside of the issues as presented on appeal, and has concluded from their examination of the evidence that a "rational and logical inference might be drawn" of defectiveness in the *design* and manufacture of the bolts involved in the truck some one year and 237,448 miles prior to the accident, when in fact, said issue was never presented to a jury, and was not part of the matter submitted on appeal. The petitioners herein are without remedy for relief from the unjust affirmance of the opinion, in that the petition for rehearing has been summarily denied by the court below.

The petitioners further suggest, as additional reason for granting the writ, that there is absolute lack of evidence to establish the recognized rule of law that defective condition must be proven at the time of delivery of the truck. The truck in question was sold to the respondent's employer some one year and 237,448 miles prior to the accident, and there was absolutely no evidence in the record to establish conclusively whether the defect in fact existed. Even though the rule of law is accurately set forth in the opinion of the court below as to the requirements, the conclusions as to the evidence are in severe conflict with other circuit courts in the application of the rule to the evidence which was submitted in the trial court. *H. W. Klein, Suc-*

cessor in Interest to Dixie Drilling Co. v. *Continental Emsco*, 5th Cir. 1971, 445 F.2d 629; *Ford Motor Co.* v. *McDavid*, 4th Cir. 1958, 259 F.2d 261; *Smith* v. *General Motors Corp.*, 5th Cir. 1955, 227 F.2d 210.

The court below has further completely refused to consider the most recent case in the State of Oklahoma decided subsequent to the appeal to the Court of Appeals, which would require reversal of the trial court's judgment. *Thompson* v. *Trane Co.*, April 11, 1972, 43 Okla. Bar Association Journal 1105, specifically sets forth the requirements to establish liability for a defective product in the State of Oklahoma, setting forth the rules and requirements disallowing conjecture or speculation relative to the evidence, and specifically restricting the courts or juries from guessing as to several different possible causes in establishing a defect. This most recent case requires probative evidence to establish the existence of the defect at the time of delivery from the manufacturer and seller, and prohibits speculation as between possible causes.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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October, 1972

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1972

FILED
United States Court of Appeals
Tenth Circuit
AUG 11 1972
HOWARD K. PHILLIPS
Clerk

WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Appellants,	)	
v.	)	No. 72-1040
FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. No. CIV. 70-253)

Kent Fleming of Watts, Looney, Nichols & Johnson, Of Counsel, and Clyde J. Watts for Appellants.

Ben T. Lampkin and John W. Norman of Lampkin, Wolfe, Abel, McCaffrey & Norman for Appellee Finis Stewart.

Lawrence E. Hoecker of Pierce, Couch, Hendrickson, Gust & Short for Appellee (Intervenor) Lee Way Motor Freight, Inc.

[APPENDIX]

Before BREITENSTEIN, HILL and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This diversity action is a products liability case in which Oklahoma law of implied warranty of fitness for intended use was applied. Plaintiff-appellee Stewart, a long-haul truck driver for Lee Way Motor Freight, the intervenor-appellee, received serious injuries when his truck went out of control, left the highway and turned over. The incident occurred on a clear night in good weather while Stewart was driving a tractor-trailer combination which had been manufactured by defendant-appellant Freightliner Corporation and sold by it through White Motor Corporation to appellee's employer Lee Way.

Stewart testified that he experienced a sudden vibration and inability to control or steer the truck. He struggled with the steering wheel in a vain effort to prevent the truck from going hard to his right. He let up on the accelerator in an attempt to keep the vehicle on the roadway until it would roll to a stop from its 60 mile per hour speed, but after traveling 2000 feet it finally veered to the right and off the shoulder, reversed directions and overturned, landing on its left side.

Stewart was pinned in the wreckage for over an hour, his right leg being caught in the clutch pedal and his left leg lying out the door. He was hospitalized for 237 days with a compound fracture of the left leg and internal injuries consisting of a hole in the lower colon. He had very limited use of his leg; he presently wears a brace, walks with a cane, and cannot drive a truck. At the time of the trial there was a possibility that the leg might have to be amputated.

The evidence disclosed that there had been a failure in the right equalizer bracket-radius rod assembly of the

tractor's rear suspension system.[1] More particularly, the bolts holding the equalizer bracket to the frame were sheared off. An important factual issue was whether the bolts were overloaded or defective when possession was transferred from appellants to Lee Way or whether they had been overtorqued or had failed due to other improper maintenance on the part of Lee Way. Defendants also argued that Stewart had gone to sleep at the wheel and that the bolts were broken by the impact of the crash. Defendants' motion for directed verdict was denied.[2]

The jury returned a verdict for plaintiff in the amount of $350,000.00. Of this amount the intervenor Lee Way was allowed $21,951.22 by way of subrogation for workmen's compensation payments made to Stewart. Defendants moved for judgment NOV and for a new trial, both of which were denied.

There is a dispute in the evidence as to whether a manufacturer's defect produced this series of events. It was shown without dispute that after the truck came to rest, the so-called equalizer bracket-radius rod part of the tractor's rear suspension system was severed. The bolts which served to hold the equalizer bracket to the frame had sheared. Unfortunately the bolts were not preserved, but testimony was to the effect that three of the bolts were rusted suggesting that they may have failed prior to the incident while the fourth was shiny indicating that it had sheared off at the time.

The mentioned radius rod is a transverse member which connects to the axle and wheel assembly and serves to support the axle so as to prevent, in part at least, its swinging on a horizontal plane, the effect of which would

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[1] This assembly is essential to the guidance of the truck in that it keeps the dual rear axles of the tractor in line.

[2] Negligent design was also an issue but was abandoned by plaintiff before the case went to the jury.

be turning and loss of control.[3] Defendants offered testimony of tests which showed that the wheels did not swing even when the radius rod was dislodged.

The important factual issue at trial thus was whether the bolts were defective or overloaded at the time of sale and delivery of the truck to Lee Way or whether on the other hand the maintenance on the part of Lee Way had been faulty—whether, for example, Lee Way had overtorqued the bolts at regular 100,000 mile inspections. Defendants also have maintained that the bolts were broken by the impact of the crash. In addition to the radius rod there is a rear axle spring which gives limited and secondary support to the wheel assembly and also holds the wheels in a straight course. When the rod was separated on the right side this spring became dislodged and control of the rear wheels was lost. The tractor was just over a year old and had been driven 237,448 miles. The testimony showed that this is not regarded as high mileage. Trucks of this kind have an average life of a million miles over a period of five years. Supporting bolts such as those holding the radius rod bracket here are expected to last for the entire life of the truck.

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[3] Plaintiff's expert testified as follows:

A Yes, sir, there are several points of support on this rear axle. The rear axle is supported vertically with springs which lay right here just outside the frame of the vehicle. This, the vertical support, in other words, the weight of the tractor and the weight of the trailer and the load in the trailer is pushing down on the spring and then there is another linkage that ties this drive axle to the truck and this linkage sits on either side here and there is a heavy link called a radius rod that ties this back axle to the frame of the truck so you can have the push. In other words, the spring supports only the weight. There is nothing to keep the axle from moving back and forth and there has to be a rather heavy member to support the load. When you start driving, the power is applied to the drive wheels and if they weren't supported, they would tend to move out. But when you apply the brakes, they would stop and the vehicle would go on. Of course, you have a similar mechanism on the front axle, radius rod. This is the radius rod on the front axle mounted kind of at an angle to the one on the back.

The main contention on this appeal is, as has been noted, that of insufficiency of evidence to establish existence of a defect present in the equalizer bracket-radius rod assembly at the time of delivery. Defendants complain particularly about the disappearance of and failure to produce the bolts which failed.

Further challenges by defendants are first, the alleged excessiveness of the verdict; secondly, the failure of the trial court to submit the issue of contributory negligence of Lee Way to the jury; third, the alleged error of the court in not submitting the photograph of the equalizer bracket to the jury.

The evidence in support of proximate cause does not pose a problem. No strain on the deductive process is required to conclude that the failure of the bolts caused the truck to leave the highway, turn around and finally overturn. This is not only supported by the circumstances; the expert witness Halley gave a positive opinion that this occurred.

The evidence offered to establish the existence of a defect attributable to the defendants is less conclusive. The experts on both sides testified as to this but neither took a doctrinaire stand. Plaintiff's expert, Professor Halley, testified that inadequate shear strength or an overload on bolts which were too small or too few (a defect in design or manufacture) was the number one possibility. In addition, he conceded that there were other possibilities such as lack of maintenance and excessive torquing. The case was thus presented to the jury on circumstantial evidence, and the evidence must be determined sufficient or insufficient based on the strength of the inferences that defendants were responsible for the bolts failing.

In accordance with Oklahoma law,[4] the trial court charged the jury that the essential elements of an action

[4] Marathon Battery Company v. Kilpatrick, 418 P.2d 900, 902 (Okl. 1966) and Speed Fastners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967).

based on manufacturer's or seller's breach of implied warranty of fitness required proof (preponderance of evidence) by the plaintiff that the claimed defect or defects constituting a breach of implied warranty of fitness existed at the time that the vehicle left the hands of the manufacturer or seller and must also prove that the claimed defect was the proximate cause of the accident and resulting injury or loss.[5]

I.

The Oklahoma law applicable to products liability cases proceeds on the doctrine of implied warranty of fitness for intended use. To recover, it must be established that there existed at the time of transfer from the manufacturer a defect which proximately caused the injury. Marathon Battery Company v. Kilpatrick, 418 P.2d 900, 902 (Okl. 1966). The Oklahoma Supreme Court said that a products case can be proven by either direct or circumstantial evidence:

> * * * The primary issue involved was whether the battery exploded, and this matter explicitly was submitted to and determined by the jury. We have held consistently that in civil cases the facts are provable by direct or circumstantial evidence, or by both. And it is not required that the proof rise to that degree of certainty which will support only one conclusion to the exclusion of all others. * * * 418 P.2d at 917.

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[5] The essential elements described by the court in its charge were:

FIRST: That the defendants breached an implied warranty of fitness with reference to said motor vehicle as claimed by the Plaintiff regarding the radius rod bracket and equalizer assembly of said motor vehicle and that each Defendant breached said implied warranty of fitness prior to the time it relinquished possession or control over said motor vehicle, and,

SECOND: That said breach of an implied warranty of fitness in connection with the radius rod bracket and equalizer assembly involved was a proximate cause of the accident involved and any personal injuries or losses which may have been sustained as a result thereof.

The court also said:

> We are persuaded as to the correctness of both the reasoning and the rule, and hold the manufacturer's liability was established when it was shown that plaintiff was injured while using the battery for the purpose intended by reason of a defect as to which he was not aware, and could not have ascertained by examination. 418 P.2d at 915.

In Marathon Battery the proof of plaintiff was practically limited to the inferences arising from the happening. The battery manufactured by defendant exploded while plaintiff was holding it in his hand. The opposing argument that the specific reason for the failure had to be established was rejected. The circumstantial evidence was held to be sufficient to create a reasonable inference that som defect existed in the battery. Defendant's theory that the explosion resulted from some external agency or force was rejected by the jury.

In Ford Motor Co. v. Schweitzer, No. 43096 (Okl. June 15, 1971), a case which resembles ours, there was a failure of the tie rod assembly in the steering mechanism. A witness at the scene noticed that it was rusty except for one shiny spot on the end. There was little other proof. There, however, the car was only 12 days old, making the connection to the manufacturer somewhat more clear. This court's decision in Speed Fasteners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967) interpreted Oklahoma law and is thus pertinent. The injury in that case resulted from the use of a powder-loaded gun in driving studs through a steel I-beam. The head of one of these studs separated from the shank and the ricocheting shank hit plaintiff and imbedded itself in his midsection. The possible explanations were overcharge of powder, improper handling, or a defect in the stud. Expert testimony showed that the tensile strength of the stud was below optimum hardness, but the expert was not positive that this condition accounted for the failure.

This court in affirming the judgment noted that in *Marathon* ". . . no defect was shown . . . [the battery] simply exploded."

These cases teach that the presence of a defect can be connected to the manufacturer or seller by circumstantial evidence which is logical and reasonable; at the same time the inferences need not exclude all other possibilities, and the testimony of the expert need not be limited to a single explanation.

II.

The trial court properly instructed the jury that the mere happening of an accident carries with it no presumption of breach of implied warranty but that the burden is on the plaintiff to establish the breach by a preponderance of the evidence.

This, of course, does not preclude a consideration of the actual occurrence and of the surrounding circumstances insofar as these explain the origin of a defect.

The truck was relatively new in relation to its life expectancy. The area was not one in which heavy maintenance was required. The bolts are expected to continue for the life of the truck. There had been checks at 100,000 mile intervals. About one in twenty-five requires tightening at the 100,000 mile check. When the bolts are tightened in Lee Way shops, the mechanics do not use a wrench which is calibrated. However, according to the evidence, a good mechanic can tighten such a bolt to within ten or fifteen pounds. The specification in the manual calls for 90 pounds of torque, but the bolt, according to the manual, can tolerate as much as 150 pounds. The evidence of plaintiff stressed the difficulty of reaching this point. There was no showing that any of the bolts here had been in fact tightened; proof did show that the bolts are visually checked and tested and are tightened if need is found.

The bolts were shown to have sheared, and there was no showing that they had loosened, and thus the only competing or countervailing inference was that of overtorquing. Further, there was a lack of evidence that the bolts had been replaced. Lee Way showed that they infrequently substituted bolts and that when they did so they installed stronger ones.

From these basic facts it is logical to infer that it was the defectiveness in design or manufacture of the bolts which produced the failure.

While the evidence is not open and shut, and indeed it is not as strong as that which was present in *Marathon*, where the happening bespoke a defect, or as strong as that in *Speed Fastner*, where the activity was so hazardous to render the slightest deviation from precise standards a defect, we nevertheless cannot say that the trial court erred in holding that a trier of fact could justifiably conclude that the plaintiff's thesis that the manufacturer supplied a defective equalizer bracket-radius rod assembly was more likely so than not so. There is present a logical and rational inference that the manufacturer and seller were responsible for the defect.

III.

THE CONTENTION THAT THE DAMAGE AWARD WAS EXCESSIVE

The applicable standard for judging excessiveness is stated in Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.2d 753 (10th Cir. 1954):

> Our province is limited to determining whether the trial court, in denying the motion, abused its discretion. Ordinarily, it will not be held that the trial court abused its discretion in denying a motion for new trial on the ground that the verdict was excessive, unless it affirmatively appears that it resulted from bias, prejudice, or passion. 216 F.2d at 756-757.

It was here stipulated by the parties that an officer of Lee Way would, if called, testify that Stewart's temporary earning loss from the time of the accident to the trial was $31,178.00; his future earnings based on his 1971 pay rate would have been $395,520.00 ($16,480.00 per year for 24 years). It was also agreed that any sum of money awarded could earn five percent per annum. The trial court instructed the jury in accordance with the stipulation and, in particular, told the jury that it should discount the award for future earnings by the five percent rate in view of cash payment. The evidence as to medical and hospital expenses incurred was $17,411.72; future medicals were estimated to be $22,500.00.

There was evidence that plaintiff suffered pain. He was pinned in the wreckage for over an hour and suffered continuing pain from the deformity of the leg and the numerous skin grafts which were required. At least some part of the award could have been for pain and suffering.

Defendants argue for the first time on appeal that plaintiff in the future could obtain some kind of employment and that this would reduce the future loss of earnings. But the doctor called by plaintiff testified that Stewart was totally disabled and that continued use of a leg apparatus was foresecable. There also was the possibility of amputation and the substitution of an artificial leg. Defendants produced no testimony of their own on the issue of damages and did not make an issue of or ask for an instruction as to offsetting future earnings.

The award was not so excessive as to suggest that it was based on prejudice and so as to call for a ruling that the trial court erred in refusing to set aside the verdict.

IV.

THE QUESTION WHETHER CONTRIBUTORY NEGLIGENCE OF LEE WAY COULD BAR ITS RECOVERY

The defendants were refused an instruction which would have told the jury that a finding of contributory negligence by Lee Way would bar any recovery by it.

Lee Way had intervened so as to protect its right to share in any award gained by its employee, to the extent of the workmen's compensation payments. Under Oklahoma law the payer of the workmen's compensation benefits is subrogated to the claim of the injured workman against the tortfeasor. See Travelers Insurance Company v. Leedy, 450 P.2d 898 (Okl. 1969). This court has previously held that in Oklahoma contributory negligence of the employer is no defense ~~in~~ a direct action (which this was not) for recovery of compensation payments, since contributory negligence of the employer would not be a defense in an action by the employee. Baker v. Traders & General Insurance Co., 199 F.2d 289 (10th Cir. 1952). There is no suggestion in *Baker* that this principle changes when the employer rather than his insurance carrier exercises the right to recoup the payments required by the Oklahoma Workmen's Compensation Act, and there is no indication that the Oklahoma Supreme Court would so hold. In each instance the claimant stands in the shoes of the injured person.

V.

REFUSAL OF THE TRIAL COURT TO SUBMIT TO THE JURY THE PHOTOGRAPH OF THE EQUALIZER BRACKET

A photograph of the equalizer bracket showing its severed bolts and the rust on the ends of three of them was taken at the scene of the accident. Plaintiff attempted to get this photograph into evidence, but it was excluded

as a result of the defendants' objection that an identification witness was not present. However, the photo was used by the plaintiff's expert for the purposes of his testimony, and this was not objected to. In fact, the defendants used the photograph for the purpose of cross-examining Halley. Nor was there any mention of this point when the case went to the jury. Under the circumstances, we perceive no error in the court's refusal to comply with defendants' belated request that the photograph be submitted.

The judgment is affirmed.

APPENDIX B

JULY TERM—SEPTEMBER 5, 1972

Before Honorable David T. Lewis, Chief Judge; and Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges.

WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Appellants,	)	
v.	)	No. 72-1040
FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Appellees.	)	

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed the appellants in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Breitenstein, Hill and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Ruly 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Holloway, Circuit Judge, not participating.

s/ Howard K. Phillips
HOWARD K.. PHILLIPS, Clerk.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
SEP 16 1971
REX B. HAWKS
Clerk, U. S. District Court
By GLADYS W. JANIS
Deputy

FINIS STEWART, Plaintiff,	)	
-vs-	)	Case No. 70-253 Civil
WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Defendants.	)	
LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Intervenor.	)	

ORDER

In this products liability case Plaintiff recovered a $350,000 verdict at the hands of a jury against the maker and seller of a truck. A small portion thereof enures to the benefit of the Intervenor by way of subrogation, it, as Plaintiff's employer, having paid Plaintiff such sum under the Workmen's Compensation Law of Oklahoma as a result of the accident involved herein. Defendants now move for judgment notwithstanding the verdict and move for a new trial.

The case and verdict are based on alleged breach of implied warranty. A negligence count (as to design) was abandoned by Plaintiff at the close of the trial. Plaintiff

was driving a truck manufactured by the Defendant Freightliner Corporation which was sold by the Defendant White Motor Corporation to the Intervenor Lee Way Motor Freight, Inc. As his co-driver was asleep in the sleeper and the Plaintiff was driving on an Oklahoma turnpike late at night said truck ran off the road and overturned. A broken radius rod assembly bracket was found after the accident. It was Defendants' contention that the cause of the accident was due to the Plaintiff going to sleep or the manner in which the Intervenor tightened the bolts on said bracket.

Defendants generally claim by their Motions under consideration, first, that the Plaintiffs' evidence failed to establish the existence of a defect in the truck which was a proximate cause of the accident at the time Defendants passed control thereof to the Intervenor. Defendants also complain that a photograph of one of the affected parts of the truck was not identified and offered in evidence by the Plaintiff even though certain witnesses testified from the same. Defendants next complain that the verdict was excessive and, lastly, that the Court erred in refusing an instruction that contributory negligence on the part of the Intervenor would preclude any recovery by it from the Defendants.

As to the first complaint, the Court had considerable concern during the trial and still does that the Plaintiff used a proper type of expert witness and presented any evidence that a proximate cause of the accident was a defect in the truck chargeable to the Defendants at the time of delivery under the implied warranty doctrine. Even though a case founded on breach of implied warranty (strict liability) does not require proof of privity or negligence, the Plaintiff's proof must show that he has been injured by a defective product and mere possibility is not enough. However, under the pronouncements of *Marathon Battery Company* v. *Kilpatrick*, 418 P. 2d 900 (Okl. 1965); *Ford Motor Company* v. *Schweitzer, a minor, et al.*, Case No. 43096 before the Oklahoma Supreme Court, *The Jour-*

nal (published by the Oklahoma Bar Association) dated June 19, 1971, page 1577, Vol. 42 No. 23; *Speed Fastners, Inc.* v. *Newsom*, 382 F. 2d 395 (Tenth Cir. 1967) and *Henningsen* v. *Bloomfield Motors, Inc.*, 161 A. 2d 69 (NJ 1960), the Court in overruling this contention of Defendants, invites a close study of the matter by the Circuit Court on appeal and would not be disturbed by a reversal of the case on this ground.

As to the second complaint, the photograph (marked Plaintiff's Exhibit No. 6) was offered in evidence by the Plaintiff at which time the Court inquired of Defendants if they had any objections. The Defendants expressed doubt as to adequate identification but stated they would have no objection to the witness then on the stand pointing out on this picture for illustration what he saw, provided, that the photograph would be properly identified. Counsel for Plaintiff concurred and proceeded to follow this procedure with the witness on the stand.[1] In view of the foregoing

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[1] The transcript reveals this discourse on this point:

"BY MR. NORMAN

Q Mr. Fortsberry, I will hand you what has been marked as Plaintiff's Exhibit Number 6 and is that the lower half of the bracket that you observed at the scene of the accident?

A Yes, sir.

Q Alright. And does it depict the bolts and rust that you described?

A Yes, sir.

Q Just as you recall them from this?

A Yes, sir.

Q We will offer Plaintiff's Exhibit Number 6.

THE COURT: Any objections?

MR. WATTS: I doubt this is adequate identification, but I am convinced that this is the picture of the same bracket. It is not the bracket its self. This is just the top of the bracket. I would, if we can describe what it is, I will have no objections to it and where it came from, I would like a little more history on it.

THE COURT: Well, since this witness didn't make the picture, it is only proper for him to testify that what he saw was correctly portrayed in that picture.

the Court did not admit the photograph in evidence, considered that there had been an objection by Defendants to the same and further considered that the parties had agreed on a procedure to be followed in connection with said photograph. Thereafter this exhibit was freely used by all parties as they solicited testimony from various witnesses and did so without objection. A further renewed offer to admit the exhibit in evidence was not made by any of the parties and therefore the exhibit was not admitted in evidence because of the aforementioned objection, the understanding reached by the parties as to how to proceed with reference to the photograph and the failure of any of the parties thereafter to renew or make a further offer of the exhibit into evidence. The jury desired to see the photograph during its deliberations but as it was not an exhibit admitted in evidence by the Court, the Court had no choice but to advise the jury that the photograph was not in the evidentiary record before them. This jury request was discussed with the attorneys and no objection was made to the response of the Court to the request of the jury. The cases cited by the parties are not in point. The point involved is that a photograph was used by witnesses in connection with their testimony without objection and in fact by agreement but the same was never finally offered in

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[1] (Continued)

MR. WATTS: I would agree—I am sure counsel cannot identify it. I would have no objections to him pointing out on this picture for illustration what he saw provided we can have an understanding that the picture will be properly indentified. (sic) That would save a little time.

THE COURT: Very well.

BY MR. NORMAN:

Q Alright. Taking this crayon then, will you draw a circle around, a large circle so you don't draw over the shinney (sic) bolt that you observe.

Alright. And the other bolts there are the ones you observed to be rusty?

A Yes, sir."

evidence by anyone. The Defendants are in no position to complain about this exhibit not being admitted in evidence by the Court. This is so for the exhibit would have been admitted in evidence had they not objected when the same was offered by the Plaintiff. Moreover, if the Defendants thereafter felt themselves prejudiced with references to this photograph not being again offered and admitted in evidence all they needed to do was to themselves offer the same in evidence and it would have been admitted by the Court as it had been identified as a photo of a broken part taken shortly after the accident and represented the true and accurate condition thereof after the accident. No error is believed to exist in these circumstances.

As to the third complaint, the Court does not feel that the verdict is excessive under the evidence in view of Plaintiff's considerable pain and suffering, severe permanent injuries and loss of future earning capacity to result therefrom and considerable medical and hospital expenses. The verdict is believed to be in proper range under the evidence.

As to the last complaint, the Court did not give the requested instruction because of a legal pronouncement of our Circuit. If this refusal be error our Circuit will have to reverse itself as this proposition is viewed by the Court. See *Baker* v. *Traders & General Ins. Co.*, 199 F. 2d 289 (Tenth Cir. 1952). Also see *Houk* v. *Arrow Drilling Company*, 439 P. 2d 146 (Kan. 1968).

Defendants' Motions are each overruled this 16th day of September, 1971.

s/ Fred Daugherty
Fred Daugherty
United States District Judge